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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 759

ERNEST L. LEVINE,

Petitioner,

vs.

DAVID H. BERMAN AND DOROTHY BERMAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DAVID H. BERMAN CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported at 178 F. 2d 440 and appears in the Transcript of the Record at Page 240.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 19, 1949 (Tr. 248). No petition for rehearing was filed. The petition for writ of certiorari was filed April 17, 1950. The jurisdiction of this Court is invoked under the Judicial Code (28 U. S. C. A. 1254 (1)).

QUESTIONS PRESENTED.

1. Whether the words "shall have power," as used in Section 308 (e) of the Selective Training and Service Act of 1940 as amended (50 U. S. C. A. App. Sec. 308), are mandatory upon the District Courts of the United States to award damages to a veteran who has been restored to his former position or leave the award of damages in such case to the discretion of the District Court.

2. Whether the findings of the Master, which were adopted by the District Court and by the Court of Appeals, will be again reviewed.

3. Whether the decision of the Circuit Court of Appeals in the first appeal (161 F. 2d 386) ordering the petitioner restored to his former position was *res judicata* of his right to recover damages.

STATUTES INVOLVED.

Section 8 (b) of the Selective Training and Service Act of 1940, C. 720, 54 Stat. 885 (50 U. S. C. A. App. 308 (e)) provides:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits."

STATEMENT.

The petitioner, a discharged veteran, originally filed his petition in the District Court praying that the respondents be ordered to restore him to the position he held before his induction in the Army. He was represented by the District Attorney as required by the statute. The District Court dismissed the petition. On appeal the Court of Appeals held that he was entitled to restoration and reversed the decree with directions (*Levine* v. *Berman*, 161 F. 2d 386). After remandment the petitioner applied for an order of restoration and an award of damages allegedly sustained because of the respondents' previous failure to restore him. The petitioner claimed damages in the amount of $52,500.00 which he claimed to be 10% of the gross sale price of all rugs sold in his former territory by the respondents during the period from December 18, 1945, to December 23, 1947 (Tr. 21 and 27). The respondents filed a written answer to this motion and denied, among other things, that the petitioner was entitled to any damages whatsoever from the respondents (Tr. 4). On December 23, 1947, the District Court entered its order directing that the respondents forthwith restore petitioner to his former position and reserved jurisdiction on the question of damages (Tr. 28). The judgment ordered the petitioner restored to his former position with the respondents with the exact terms and conditions and with the same territory he had when he entered the Army. The order was in exact accord with the opinion and mandate of the Court of Appeals. Immediately thereupon respondents offered, as directed, to restore the petitioner, which offer was by him refused. He testified that he had obtained a very fine position with another rug company in the previous June and that he did not intend to return to his former position with respondents when he applied to the Court for an order of restoration (Tr. 67-71).

After the entry of the order of restoration and the refusal of the petitioner to accept re-employment by the respondents, the Court referred the matter to a Master to hear and consider all the issues, whether of law or fact or both, remaining undetermined in the cause and to take testimony and receive evidence if such was necessary to a determination of the issues. The only remaining issue was whether or not the petitioner was entitled to damages and if so, how much (Tr. 30). The Master took evidence and after a full hearing found as a matter of fact and concluded as a matter of law that the petitioner's claim for damages in the exorbitant sum of $41,596.55 was based upon fraud and deceit supported by the petitioner's own perjured testimony and so unconscionable that it should be denied (Tr. 40-49). The District Court adopted the Master's findings and recommendations and entered judgment for the respondents (Tr. 225). On appeal the Court of Appeals concluded that the evidence supported the Master's findings, accepted such findings and affirmed the judgment.

In January, 1941, the petitioner, aged 25, was employed by the respondents in the capacity of a junior salesman to sell retail establishments a line of floor coverings. He was to travel through a territory comprising several States and his compensation consisted of commissions based upon a percentage of respondents' gross sales derived from his territory. He was required to pay his traveling expenses. After fifteen months he left his employment to enter the Army. During his entire fifteen months of employment his total gross commissions were $5,697.43 (Tr. 41). He was discharged from the Army on December 17, 1945, and immediately made application to the respondents for re-employment, demanding his old territory, the same commission rate and all the rugs that he could sell in the territory. At this time the respondents' volume of business had greatly increased and they had three salesmen covering

the territory formerly traveled by petitioner. Respondents offered to re-employ the petitioner as a salesman and allot him enough merchandise to guarantee him a salary of $7,500.00 a year. The petitioner refused all offers of employment except that he be re-employed in his old territory with 10% commission and without allotment. When the respondents refused to do this, petitioner complained to the Selective Service Board and the respondents were called before this Board to consider petitioner's demands. Nothing was accomplished at this meeting and after the meeting the petitioner said to one of the respondents that he would take $25,000.00 to settle his demands (Tr. 76).

During the pendency of his petition for re-employment, the petitioner worked for another rug company as a salesman but denied that he received any compensation for his work (Tr. 106-108). He denied that he had told three disinterested witnesses that he had an opportunity to take a position with the company but would not take the position because he was waiting to see what he could get out of the respondents (Tr. 109). Each of the three disinterested witnesses testified that the petitioner had made such a statement to him (Tr. 155-163). The Master found that the petitioner had testified falsely when he denied that he had these conversations with the three witnesses (Tr. 46). The Master found that the petitioner did not make his application for restoration in good faith but sought an order of restoration as a basis for his claim of damages against the respondents for failure to re-employ him and concluded that the application of the petitioner for compensation was tainted with deceit and bad faith and, under the equitable maxim that he who comes into equity must come with clean hands, the petitioner was not entitled to any relief and recommended that his petition be dismissed. The District Court and the Court of Appeals agreed with the findings and conclusion of the Master.

ARGUMENT.

Contrary to petitioner's contention, there is not involved in this case any unsettled question of federal law. Neither is the decision of the Circuit Court of Appeals in conflict with the decisions of this Court or any other Circuit Court of Appeals on the questions involved.

That actions under the statute in question are equitable in character was determined by this Court in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 91 L. Ed. 1328. In that case this Court said:

> "This action is equitable in character and equity traditionally adapts its remedies to the facts as developed by trial rather than to the form of pleadings."

The various Circuit Courts of Appeals and District Courts have uniformly held that the words "shall have power," as used in the statute are discretionary and not mandatory and that Congress intended that any award of damages in these cases to be discretionary with the District Court. *Boston & M. R .R.* v. *Bentubo,* 160 F. 2d 326; *Tsang* v. *Kan,* 173 F. 2d 204; *Doane Co.* v. *Martin,* 164 F. 2d 537; *O'Connor* v. *Yardley Golf Club,* 79 F. Supp. 264; *Flynn, et al.* v. *Ward Leonard Electric Co.,* 84 F. Supp. 399.

This case presents the rather simple question, mainly factual, of whether the Court abused its discretion in denying damages to the petitioner. The Master, the District Court and the Court of Appeals found that petitioner's application for re-employment was not made in good faith and was based on fraud, deceit and supported by his own perjury. We submit that these findings are amply supported by the evidence and there was no abuse of discretion in denying damages. Even assuming that the Court

below misconceived the facts, this is not the type of a question which calls for a review by this Court.

Petitioner contends that the opinion of the Court of Appeals in the first appeal (*Levine* v. *Berman*, 161 F. 2d 386) was *res judicata* on the question of petitioner's good faith and his right to damages. The only question before the Court in that case was whether or not the petitioner should be restored to his former position and the Court of Appeals was of the opinion that he should be and that opinion was complied with. The question of damages was not before the Court and that decision had no hearing on the petitioner's claim to compensation. The decision in that case was based upon conditions as they existed on December 18, 1945. The Master's findings of fact approved by the District Court and the Court of Appeals were based upon conditions existing in December, 1947, after the District Court had fully complied with the mandate of the Court of Appeals on the first appeal. Insofar as those findings relate to the facts as existing at the time of the first trial, they are in accord, supplemented only by subsequent events. There is nothing in the Master's findings of fact at variance with any question of fact determined on the first appeal.

Since the statute affords a returning veteran an action equitable in character, his right to relief is based upon the factual situation as developed by trial. In actions equitable in character, the decree is a determination of the rights of the parties according to equity and good conscience and it is such as the nature of the case, the law and facts demand, not at the time of the inception of the litigation but at the time the decree is entered therein. *Randel* v. *Brown*, 2 How. 406, 43 U. S. 405.

If an employer refuses to comply with the provisions of the Selective Training and Service Act, the act provides

that the District Court *"shall have power * * * to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."*

The plain meaning of this statute is that District Courts shall have power to award damages as an incident to restoration. Since the power to compensate for lost wages is an incident to restoration, it was incumbent upon the petitioner to secure an order of restoration to support his application for damages. It is clear from the record that petitioner has never made a good faith application for restoration. His sole purpose was to use the law, enacted for the benefit of ex-servicemen, in an effort to force the respondents to pay him a lump sum of money in exchange for his rights to restoration. He admits that he had a better position and did not intend to accept a position with the respondents. This was the situation when he made his application for re-employment, and his petition to the Court for relief that he did not intend to accept, was a fraud upon the Court and an act of bad faith.

The petitioner contends that the decision of the Circuit Court of Appeals in the first appeal was determinative that he was acting in good faith in seeking re-employment. The Circuit Court of Appeals did not so construe its opinion but assuming that the order of re-employment impliedly found that the petitioner made his application in good faith, subsequent events conclusively prove that the petitioner's application for restoration was for the sole purpose of laying his foundation for damages. Since the question of damages was not before the Court of Appeals on the first appeal, the question of good faith was likewise not before that Court. Subsequent events demonstrate that the petitioner was not in good faith, that he was deceitful, fraudu-

lent and untruthful. These factual findings are supported by the evidence and should not be again reviewed.

In the case of *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 61 L. Ed. 356, 357, this Court said:

> "The case is preeminently one for the application of the practical rule that so far as the finding of the Master or Judge who saw the witnesses depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

The statute under which the petitioner seeks damages is economic and not penal. The congress intended that the Court should have discretionary power to allow the veteran damages upon the refusal of his employer to reemploy him. Such damages are in the nature of restitution for lost wages and other benefits. Restitution is not of mere right. It is *ex gratia,* resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it. (*Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 79 L. Ed. 1451.) The grant or denial of restitution as an incident to the main relief is always governed by equitable principles and left to the sound discretion of the Court. *Greenwood County* v. *Duke Power Co.,* 107 F. 2d 484.

In *Boston & M. R. R.* v. *Bentubo,* 160 F. 2d 326, the Circuit Court of Appeals for the Second Circuit, in construing the statute, at Page 328 said:

> "It (Congress) contented itself with a statement of public policy and left the application of its policy to particular situations to the sound discretion of the District Courts. Having done this with respect to the basic right to reemployment itself, we think it probable that Congress also intended to do the same with respect to the incidental rights of the wages lost to a veteran by reason of his former employer's unlawful refusal to rehire." (Parenthetical matters supplied.)

Conclusion.

It is respectfully submitted that the Master, District Court and the Court of Appeals have correctly construed the statute as conferring upon District Courts a discretionary power to allow or deny damages as the circumstances require in each particular case, and that such discretion was soundly exercised in this case. It is also respectfully submitted that the questions presented by the petitioner are not of the type which call for a review by this Court and the petition for writ of certiorari should be denied.

Respectfully submitted,

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